Supreme Court, U.S.
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No. 94-1655

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Evangelin Marie Miller, *Petitioner,*

v.

The State Bar of California, *Respondent.*

To Petition for Writ of Certiorari
to the Supreme Court of
the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the California Supreme Court's determination that recusal was not appropriate in light of petitioner's highly speculative and conclusory allegations of bias a denial of Due Process?

2. Whether the California Supreme Court's order of discipline against an attorney based, in part, on a stipulation that was properly before the Court, raises an important federal question which should be decided by this Court?

3. Whether petitioner's vague and unsupported claims of financial interest on the part of State Bar Court judges and trial counsel raise an important federal question which should be decided by this Court?

4. Did the changes to the State Bar's Rules of Procedure, with respect to the procedure for seeking relief from or extensions of time in which to comply with Orders assessing costs imposed pursuant to Business and Professions Code section 6086.10, violate Plaintiff's right to due process?

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STATEMENT

Petitioner, Evangelin Marie Miller, ("petitioner") is an attorney who, pursuant to a Stipulation as to Facts and Disposition ("Stipulation"), entered in a State Bar of California ("the State Bar") disciplinary proceeding, was granted a period of stayed suspension from the practice of law conditioned upon her participation in a two year period of supervised probation by Order of the California Supreme Court. Petitioner seeks a writ of certiorari to review the California Supreme Court's Order, issued March 16, 1995, denying her motion for recusal, petition for review and application for a stay of the order of suspension.

Petitioner first argues that a writ of review should be granted because the California Supreme Court's recusal procedures, or lack thereof, "pose due process problems". (Petition, pp. 6-8.) Petitioner next

argues that, due to the "partisan" nature of the California Supreme Court, recusal of the California Supreme Court justices in this case was and is required. (Petition, pp. 8-9.) Petitioner alleges that her consent to the Stipulation was obtained without full disclosure by both State Bar trial counsel and the State Bar Court hearing judge, of the nature and extent of their financial interest in securing such Stipulation. (Petition, p. 11.) Petitioner contends that the Stipulation should be voided because she was not notified, in advance, of the amount of costs to be assessed in connection with her case. (Petition, pp. 11-14.) Petitioner alleges that she learned of the State Bar's "undisclosed financial interests" on or about November 25, 1995 and notified the California Supreme Court on December 1, 1994 of her withdrawal of consent to the Stipulation. (Petition, p. 5.) Petitioner contends that the Stipulation should not

have been approved by that Court. (Petition, pp. 9-11.)

As will be shown more fully below, petitioner's arguments with respect to the "partisan" nature of the California Supreme Court are groundless, and recusal was not appropriate in her case. Petitioner's contentions regarding the validity of the Stipulation are equally without merit as (1) petitioner was advised that she would be required to pay costs associated with the State Bar's prosecution of her case from the outset; (2) petitioners's attempt to withdraw her consent to the Stipulation was untimely, insufficient and legally ineffective; and (3) petitioner's allegations regarding the State Bar Court's and State Bar employees' undisclosed financial interest in the outcome of her case are frivolous, without any factual basis, and entirely without merit.

A. **Procedural History**

Petitioner was admitted to the practice of law in California on January 7, 1971. At all times herein mentioned, petitioner has been a member of the State Bar of California.

In August 1994, prior to and in lieu of the issuance of a Notice to Show Cause, petitioner, while represented by an attorney, affixed her signature to a Stipulation As To Facts and Disposition with the State Bar concerning allegations of misconduct against her. The Stipulation included an express waiver by petitioner of any rights of reconsideration and review under rules 952, 952.5 and 953 of the California Rules of Court. On September 26, 1994, in accordance with the provisions of former rules 405-407 of the

Transitional Rules of Procedure of the State Bar[1], the fully executed Stipulation was submitted to the State Bar Court for approval. On September 28, 1994 the State Bar Court hearing judge entered an Order approving the Stipulation and recommending the disposition to the California Supreme Court. In accordance with the Stipulation, the Order further approved an award of costs to the State Bar pursuant to Business and Professions Code section 6086.10. The proof of service attached to the Order indicates that it was served on petitioner, via her attorney, on September 29, 1994.

Petitioner did not attempt to withdraw or modify her consent to the Stipulation until December 1, 1994, after the matter had been transmitted to the

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[1]This is a reference to the rules which were in effect between September 1, 1989 and December 31, 1994.

California Supreme Court and long after the expiration of the fifteen (15) day deadline provided for by the Transitional Rules of Procedure of the State Bar.[2]

On January 27, 1995, petitioner filed an untimely petition in the California Supreme Court, seeking relief from the Stipulation transmitted to the California Supreme Court on November 16, 1994.[3] Petitioner requested that the Court recuse itself and refer the matter to an appellate panel to resolve the

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[2]Former Rule 407(c) of the Transitional Rules of Procedure of the State Bar provided as follows: "Once adopted by the hearing judge, the stipulation shall bind the parties in the proceedings to which it relates unless withdrawn or modified with approval of the judge, upon good cause shown and upon application of a party made within fifteen (15) days of service of the order approving stipulation."

[3] Rule 952(a) of the California Rules of Court requires a petition for review of a State Bar Court decision be filed within 60 days after the decision is filed with the Clerk of the Supreme Court.

issues posed in her petition. In addition, she requested a stay of the proceedings with respect to the Stipulation until the issues raised in her petition had been resolved.

The California Supreme Court denied the petition, application for a stay, and motion for recusal by an Order issued March 16, 1995, in case number S043344. Petitioner now seeks a writ of certiorari to review the California Supreme Court's Order.

B. Statement of Facts

The following is a summary of the facts as set forth in the Stipulation.

In early 1990, petitioner entered into an agreement with an organization of non attorneys called Living Trust Seminars. Petitioner was engaged to draft durable power of attorney, revocable trust and related estate planning documents for the clients of Living Trust Seminars. Living Trust Seminars

advertisements were deceptive, confusing and misleading in suggesting that Petitioner and/or a law office was sponsoring the seminars.

United American Trusts, another entity also owned and operated by non attorneys, made arrangements with Living Trust Seminars for estate planning document preparation. At least two clients paid United American Trust for estate planning services. United American Trust forwarded information obtained from the clients to Living Trusts Seminars. Petitioner, without having any personal contact with these clients prepared trust and other estate planning documents, acting in the capacity of attorney for the clients. The documents were returned to the clients by United American Trusts via Living Trusts Seminars. These clients, when their spouses passed away, discovered that the documents prepared by Petitioner did not meet their estate planing wishes.

In one client's matter, more than eight trust beneficiaries were given title to the surviving spouses residence instead of providing her with clear title as she had wished. In a second matter a will drafted by Petitioner was found to be invalid because it was not properly witnessed.

Petitioner's relationship with Living Trust Seminars aided their unauthorized practice of law. Moreover, petitioner failed to act competently when performing legal services for the clients of United American Trusts. Also, by representing both husband and wife in their estate planning matters, petitioner represented clients with adverse interests.

The Stipulation and State Bar Court Order issued thereon, recommended that petitioner be suspended from the practice of law for a period of two (2) years, that the execution of the suspension be stayed, that petitioner be placed on probation for two

(2) year with conditions. The California Supreme Court approved these recommendations in an Order issued March 16, 1995.

REASONS FOR DENYING WRIT

A. The California Supreme Court's Determination that Recusal Was Not Appropriate and Its Subsequent Order Imposing Discipline Does Not Raise Due Process or Important Federal Questions

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the reasons set forth in rule 10 are available here. There is no decision by a federal appellate court (rule 10(a)); the California Supreme Court decision at issue does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and

the California Supreme Court decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)).

The absence of a *mandatory* statutory recusal mechanism applicable to the justices of the California Supreme Court does not make a showing of bias unnecessary. As in any case, it was entirely appropriate for the California Supreme Court to be given the opportunity to decide the issue of alleged bias of its individual members for itself. Flangas v. State Bar of Nevada (9th Cir. 1981) 655 F.2d 947, 950.

B. Petitioner's Claims Regarding the "Partisan" Nature of the Supreme Court Are Groundless and Recusal is Unnecessary

Petitioner contends that the California Supreme Court is biased in favor of the State Bar, and that it cannot therefore carry out, in a disinterested manner,

its adjudicative role in reviewing and making final determinations with respect to the discipline of attorneys in the State of California. (Petition, pp. 8-9.) In support of these contentions, petitioner argues that the California Supreme Court's role in appointing State Bar Court judges and awarding costs to the State Bar are in conflict with its adjudicative role. (Petition, p. 7, fn. 2.) Petitioner cites this Court's decision in Aetna Life Insurance Co. v. LaVoie (1986) 475 U.S. 813 for the proposition that, because of this supposed conflict, the California Supreme Court should have recused itself from reviewing the State Bar Court's approval of the Stipulation and recommendation of discipline in her case.

Petitioner's reliance on Aetna, supra, is unavailing. In Aetna, the Court held that the Due Process Clause of the Fourteenth Amendment required that an Alabama Supreme Court justice be

recused for bias in circumstances where the justice had a " . . . direct, personal, substantial, pecuniary interest . . ." in the outcome of a particular case. Aetna Insurance Co. v. LaVoie, supra, 475 U.S. at 822. In the instant case, rather than presenting evidence to demonstrate a direct, personal, substantial pecuniary interest in her case, petitioner merely proffers highly speculative and conclusory allegations of bias.

C. **Petitioner's Attempt to Withdraw Her Consent to the Stipulation Was Insufficient, Untimely and Ineffective**

Former rule 407(c) of the Transitional Rules of Procedure of the State Bar[4] provided as follows: "Once adopted by the hearing judge, the stipulation shall bind the parties in the proceedings to which it relates unless withdrawn or modified with approval of the judge, upon good cause shown and upon application of a party made within fifteen (15) days of service of the order approving stipulation." (Emp. added.) The State Bar Court hearing judge approved the Stipulation on September 28, 1994. The proof of service attached to the Order indicates that it was

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[4]This rule corresponds with, and is essentially the same as, current rule 135(b) of the Rules of Procedure of the State Bar (effective January 1, 1995). The Rules of Procedure of the State Bar are published in volume 23, West's Annotated California Codes (Rules of Court) part 2.

served on petitioner, via her attorney, on September 29, 1994. Petitioner allowed several months to pass before she acted to withdraw her consent to the Stipulation by first sending letters to both the State Bar Court and the California Supreme Court in early December, 1994, and then by filing a petition for review in the California Supreme Court on January 27, 1995.

D. Petitioner's Claims Regarding Conflict of Interest and Financial Interest of the Hearing Court Judge and Trial Counsel are Frivolous, Unsupported by any Evidence, and Wholly Without Merit

Petitioner next argues that because the State Bar Court failed to disclose its secret financial interest in the outcome of her case, her consent to the Stipulation was "uninformed" and the Stipulation should be voided. (Petition, pp. 11-14.)

Complimenting the lack of relevant legal authority supporting her theory, petitioner presents no facts to demonstrate that an undisclosed financial interest exists. She relies instead on vague, conclusory and false allegations concerning the structure and function of the State Bar disciplinary system. Specifically, petitioner contends that the State Bar Court is operated from funds obtained, in the form of costs, from respondents in disciplinary proceedings. (Petition, p. 7, fn. 2.) This is perhaps a reference to the fact that in 1986, the California Legislature provided that costs of disciplinary proceedings shall be imposed as part of any order imposing discipline of a public reproval, suspension or disbarment. Cal. Bus. & Prof. Code § 6086.10. The fact that disciplinary costs are collected and paid into the treasury of the State Bar to help finance its regulatory activities in no way supports petitioner's assertions that these funds

are used for the State Bar Court Judges' private purposes. The salaries of State Bar Court Judges are set by statute, (Cal. Bus. & Prof. Code § 6079(d)), and are not dependent, to any extent, upon the collection of disciplinary costs.[5]

E. **The Current Rules of Procedure of the State Bar Court Provide Petitioner With an Opportunity to Challenge or Modify Costs Awarded to the State Bar Pursuant to Business and Professions Code Section 6086.10.**

Petitioner likens the stipulation to a plea bargain agreement in a criminal matter and claims that because the Rules of Procedure of the State Bar

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[5]It should be noted that monies collected from attorneys found culpable of misconduct comprise only a tiny fraction of the State Bar's treasury. The revenue received from disciplinary costs assessed against attorneys, as a percentage of total annual membership fees collected, ranged from .1% to .7% of the total annual membership fees collected in the calendar years from 1990 to 1994.

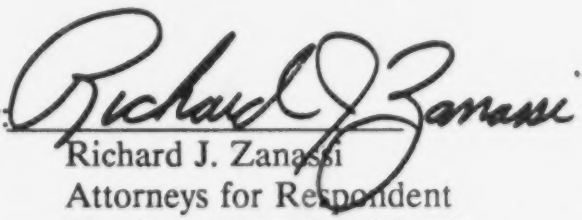
Court were amended prior to the effective date of the disciplinary action Ordered by the California Supreme Court, she is entitled to be relived of the effect of the stipulation. (Petition, p.14.) Rule 462 of the former Transitional Rules of Procedure in effect at the time Petitioner entered into the Stipulation set forth the procedure to be followed by a disciplined attorney when seeking relief from or an extension of time in which to pay costs awarded pursuant to Business and Professions Code section 6086.10. The current procedures, as set forth in Rule 282 of the Rules of Procedure provide that "this rule does not authorize a challenge to the State Bar's determination of "reasonable costs" under Business and Professions Code section 6086.10(b)(3)." The current rules provide petitioner with the same, if not more, opportunity to seek relief as was provided under the former rules.

CONCLUSION

Petitioner has failed to present any facts to support her request for a writ of certiorari, nor has she demonstrated that any of the actions taken by respondent in connection with her case were improper. For these and all of the foregoing reasons, respondent the State Bar respectfully requests this Court to deny the petition for writ of certiorari.

DATED: May 9, 1995 Respectfully submitted,

Diane C. Yu
Lawrence C. Yee
Richard J. Zanassi

By: 
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